treated as joint or several at the election of the plaintiff;[8] but he can obtain only one judgment against any defendant. A joint judgment is a bar to a several action and a several judgment to a joint action. There is but one right, which may be enforced in either of the two ways but not both.[9] A joint and several contract, however, gives rise to two distinct rights of action, there being two separate obligations, one of the parties jointly and another of the parties as individuals. A stock illustration of this is where one of several partners becomes surety on a partnership note. He thereby incurs a joint liability as a member of the partnership and a separate liability by reason of his individual undertaking of suretyship.[10] In such case, since there are two distinct rights, both may be enforced; and it follows, as a matter of course, that both may be proved—one against the partnership estate and the other against the individual estate of the surety. While it is true that, upon a joint judgment against several persons for a tort, execution may be issued against and satisfaction had from any one, all or any intermediate number;[11] yet this does not give separate rights: it is merely a matter of remedy. In this respect, it is not unlike a judgment obtained on an ordinary contract claim against a partnership, which is in its nature always joint.[12] It is for the dealing with just such claims that the rule of marshalling, giving priority to individual creditors over partnership creditors in the distribution of separate assets, was established.

It is believed that the doctrine enunciated by the decision of *Re Peck, supra,* is not consistent with the best reasoning, and, therefore, should not establish an exception to the general rule of marshalling separate assets in such cases, but that the opinion in *Reynolds* v. *New York Trust Co., supra,* correctly states the law. Upon first sight it may seem possible to reconcile these two cases, the former involving a tort action for conversion while in the latter the tort is waived and action brought in assumpsit on *quasi* contract. It will readily be seen, however, that this distinction could not affect the conclusion. The decision of the point, which undoubtedly is the same in both cases, rests upon a question of legal rights,[13] and such rights should not be affected by the nature of the remedy.

PAROL CONTEMPORANEOUS "WAIVER" IN INSURANCE.—Perhaps no branch of law presents more hopeless confusion and conflict

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[8] Atlantic & Pacific R. *v.* Laird, 164 U. S. 393. See Sessions *v.* Johnson, 95 U. S. 347.

[9] Reynolds *v.* New York Trust Co., *supra.*

[10] Wilder *v.* Keeler, 3 Paige Ch. (N. Y.) 167, 23 Am. Dec. 781. See Re Gray, 111 N. Y. 404, 18 N. E. 719.

[11] Jackson *v.* Roberts, 83 Ga. 358, 9 S. E. 671.

[12] Mason *v.* Eldred, 6 Wall. 231.

[13] See Reynolds *v.* Trust Co., *supra,* where it is said, "* * * we think that 'this is a question concerning the nature of legal rights.' The creditor's legal right was to make the claim joint or several."

among the cases than is to be found among those involving questions of waiver and estoppel in insurance. Can an insurance company take advantage of a condition in a policy making such policy void in its inception by reason of circumstances existing at the time the policy was issued, if the existence of such facts was known to the agent at the time; or is the insurer, by reason of this knowledge on the part of its agent, deemed to have waived this condition, or is it estopped from setting up its breach?

The majority holding of the state courts is that where an insurance company, at the time of the delivery of the policy, has knowledge of the breach of a condition the performance of which, by the terms of the policy, is a condition precedent to the assumption of any risk, it may not set up that breach as a defense to an action on the policy. The courts place this holding on the grounds of waiver and estoppel,[1] and have failed to distinguish clearly between the two. Though the results of these decisions are very uniform, there appears to be no hope of reconciling their varied reasoning, or of extracting any uniform ground upon which they are based. Some courts have held that the insurance company cannot set up this breach on the theory that the agent, on behalf of the company, has waived such condition;[2] others have placed it upon the ground that the knowledge of such facts on the part of the agent is imputed to the company, and it is thereby estopped to set up such facts in order to avoid the policy;[3] while others have based their decisions on the ground that to permit the company to receive the premium, knowing that the policy does not protect the holder, would be a fraud upon him which the courts cannot sanction.[4]

But can this knowledge on the part of the agent be shown by parol evidence so as to show waiver or estoppel? Is this not a violation of the parol evidence rule? In the great majority of cases in which the doctrine of waiver and estoppel has been applied, the parol evidence rule was not considered. But this question was considered in the early case of *Dewees* v. *Manhattan Ins. Co.*,[5] where it was decided that to admit parol evidence of such knowledge on the part of the agent would be a violation of the parol evidence rule. This doctrine has been upheld by the federal courts, the leading case in those courts being *Northern Assurance Co.* v. *Grand View*

[1] Van Schoick *v.* The Niagara Fire Ins. Co., 68 N. Y. 434; Rowley *v.* Empire Ins. Co., 36 N. Y. 550; German Ins. Co. *v.* Shader, 68 Neb. 1, 93 N. W. 972, 60 L. R. A. 918 (citing in the opinion cases from twenty-seven states in support of this proposition); Cassimus Bros. *v.* Scottish Union and Nat. Ins. Co., 135 Ala. 256, 33 South. 163; Hartley *v.* Penn. F. Ins. Co., 91 Minn. 382, 98 N. W. 198, 103 Am. St. Rep. 512; Johnson *v.* Ætna Ins. Co., 123 Ga. 404, 51 S. E. 339, 107 Am. St. Rep. 92.

[2] Hartley *v.* Penn. F. Ins. Co., *supra.*

[3] Rowley *v.* Empire Ins. Co., *supra;* Plumb *v.* Cattaraugus Count Mut. Ins. Co., *supra;* Spalding *v.* New Hampshire Ins. Co., 71 N. H. 441, 52 Atl. 858; New York Mut. Savings and Loan Ass'n *v.* Westchester Fire Ins. Co., 97 N. Y. Supp. 436.

[4] Phœnix Ins. Co. *v.* Randle, 81 Miss. 720, 33 South. 500.

[5] (1872) 35 N. J. L. 366.

Building Association.[6] The courts of Oklahoma,[7] Massachusetts,[8] and New Jersey[9] also adhere to the federal doctrine.

Most of the state courts which have faced this question have held that parol evidence is not admitted to contradict or vary the terms of a written instrument, but to show that it was procured under such circumstances as to estop the company from relying on its contents; not that such testimony may be admitted to contradict or vary the terms of a valid written instrument, but to show that the conditions should not be used against the insured, on the ground of equitable estoppel.[10] However, as was argued by the court in the Grand View Case, the ultimate result of such a rule is to give a different effect to the written terms from that which they intrinsically possess, and this result is induced by the admission of oral evidence. The extrinsic evidence would fail in its object unless its purpose were to show that the contract written in the policy is not the contract which in reality was made. It is a well settled rule that all prior, or contemporaneous parol negotiations and agreements are merged in the written contract, and are not to be changed or modified by parol evidence in relation thereto. A policy of insurance is a contract in writing such as would bring it under this parol evidence rule. Hence, the mode of construction adopted by some of the courts, by means of which an estoppel can be shown without violating the parol evidence rule seems technically unsound in the light of the argument of the Grand View Case.

Though, technically, the federal view seems to be correct, the state view is eminently fair and just, and better adapted to work substantial justice. The parol evidence rule was adopted in order to prevent fraud, but in insurance cases of this type the reason for the rule fails. It would seem the better policy, in allowing parol waivers, to frankly admit that in doing so the parol evidence rule is violated, and that an exception is established in favor of holders of

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[6] 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213. The policy contained a provision that it would become void if there were any other insurance on the property unless written in the policy. At the time of the issuance of the policy there was in fact other insurance on the property, and this fact was known to the insurer's agent. *Held*, parol evidence to show this knowledge on the part of the agent is inadmissible.

[7] Deming Invest. Co. *v.* Shawnee F. Ins. Co., 16 Okla. 1, 83 Pac. 918, 4 L. R. A. (N. S.) 607.

[8] Batchelder *v.* Ins. Co., 135 Mass. 449.

[9] Dewees *v.* Manhattan Ins. Co., *supra;* Franklin F. Ins. Co. *v.* Martin, 40 N. J. L. 568, 29 Am. Rep. 271.

[10] German Ins. Co. *v.* Shader, *supra;* It was said in this case by Pound, C.: "There is no attempt to show by parol something which is foreclosed by the written agreement of the parties. The attempt is to show by parol that the company knew of the facts and circumstances which entitled it to enforce the provisions of the policy as to forfeiture or not, at its option, and that the company itself, not any particular agent, continued to treat the policy as in force, and declined to exercise such option. For these reasons we think the former adjudications of this court should be adhered to, and, in consequence, that the testmony objected to in the case at bar was admissible."

insurance policies; and there is undoubtedly such a growing tendency among the courts.[11]

The recent case of *Marx* v. *Williamsburgh City Fire Ins. Co.* (Mich.), 158 N. W. 1052, demonstrates the firmness with which the state court doctrine is established. The court, without hesitation, held that the issuance of the policy by an agent, cognizant of such facts as invalidated the instrument in its inception, constitutes a waiver of the condition in the policy. In strictness, the facts point to an estoppel rather than waiver, but the significant feature of the opinion is the failure of the court to consider the effect of the parol evidence rule on the testimony introduced by the plaintiff to show the waiver. The alacrity with which the court found for the plaintiff would seem to indicate that the exception to this important rule is recognized beyond further cavil, except in the few jurisdictions where it has been repudiated.

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[11] See Welch *v.* Fire Association, 120 Wis. 456, 98 N. W. 227; Spalding *v.* Insurance Co., *supra.*